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IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN CALIFORNIA EDISON, Appellant, vs. THE STATE OF NEVADA DEPARTMENT OF TAXATION, Respondents.	Case No. 67497 District Court No.: 09 OC 00016 1B (First Judicial District Court of Nevada)

RESPONDENT'S ANSWERING BRIEF

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The State of Nevada, *ex rel*. its Department of Taxation ("Department") by and through counsel Adam Paul Laxalt, Attorney General, Gina C. Session, Chief Deputy Attorney General, and Andrea Nichols, Senior Deputy Attorney General, hereby submits its Answering Brief in this civil appeal.

I. ISSUE PRESENTED

Is the State required to refund $24 Million Dollars[1] to Southern California Edison ("SCE") on use tax voluntarily paid by SCE to the State on the use and consumption of a coal slurry product purchased in Nevada, when SCE has not provided any evidence of actual discrimination or injury?

II. SUMMARY OF THE ARGUMENT

SCE is like an aging magician that, after 13 years, has run out of tricks. There is no combination of diversion, smoke and mirrors or the blowing of black coal dust that can justify a multi-million dollar refund to SCE. SCE's efforts to conflate and confuse the details to fit its theory of the case cannot change the simple, straight-forward facts: There is no Nevada coal market. There has never been a single instance of a coal transaction in Nevada that was exempt from sales and use tax. SCE's purchase of a coal slurry product took place in Nevada, not Arizona so there was no out-of-state sales transaction. SCE has not presented any

[1] This amount is only for the tax period from March 1998 through December 2000. The total refund amount claimed by SCE for all tax periods, including interest through June 30, 2013, is a staggering $111.8 Million Dollars.

facts that would justify this Court treating SCE any differently than it did NV Energy in the *Sierra Pacific v. State Department of Taxation*, ___ Nev. ___, 338 P.3d 1244 (2014). In this case, the questions regarding similarly situated taxpayers and the questions regarding market competitors require separate and distinct analysis. SCE attempts to confuse the two issues because it loses under both counts and their only hope is to blur the lines between the two.

As this Court noted in the *Sierra Pacific* case, both power companies utilizing coal in producing electricity in Nevada were required to pay use tax on the use of coal mined out-of-state. This makes SCE and NV Energy similarly situated taxpayers. SCE makes a much weaker case than the case in *Sierra Pacific* because rather than purchase unprocessed rail coal in a transaction that took place out-of-state, SCE purchased a processed coal slurry product in a transaction that took place in Nevada. There is no basis for this Court to decide this case any differently than it decided *Sierra Pacific.*

The fundamental objective of the dormant Commerce Clause is "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 279, 299 (1997). The market at issue in this case is the coal market. SCE is not a market participant in the coal market, Peabody Western Coal Company ("Peabody") is the market participant. SCE only has standing to assert a claim to

the extent that it is a customer of Peabody and it was required to pay a use tax on coal slurry. *Id.* at 286. If, as a market participant in the coal market, Peabody was not harmed by the exemption in NRS 372.270[2] because there are no market participants in Nevada and no coal transactions in Nevada have been subject to the exemption, then SCE cannot claim it has suffered an injury that entitles them to a refund.

SCE is not entitled to any remedy from the State based on the following reasons:

1. As similarly situated taxpayers, SCE should not be treated differently than NV Energy.
2. NRS 372.185(2) does not apply to the transactions on coal slurry product sold to SCE because those transactions were Nevada, not out-of-state, transactions. For this same reason the facts of this case do not implicate the dormant Commerce Clause.
3. SCE purchased a processed coal slurry product that would be subject to sales or use tax in Nevada even if it were fabricated with coal mined in Nevada;
4. All sales of coal in Nevada are subject to either sales or use tax because there is no coal produced in Nevada;
5. SCE was contractually obligated to buy all of its coal from Peabody for the Mohave Power Plant, so there was no competition with natural gas, geothermal or oil as a fuel source for Mohave.
6. Peabody had no market competitor in Nevada that received preferential tax treatment;
7. SCE, beyond paying a constitutionally sound use tax, cannot identify how it has suffered an injury that would warrant "backward-looking relief."
8. Peabody, not SCE, paid the Transaction Privilege Tax ("TPP") to the

[2] NRS 374.275 is an identical provision for local school support taxes imposed by NRS Chapter 374. NRS Chapter 374 is identical to NRS Chapter 372. For the sake of simplicity, we will only cite to NRS Chapter 372 going forward.

State of Arizona. The TPP is not an Arizona sales tax on the transaction between Peabody and SCE because the sale in that transaction took place in Nevada, not Arizona.

9. The price SCE agreed to pay for the coal slurry product supplied by Peabody included various fees and taxes paid by Peabody.

The additional facts developed during the eight day trial de novo overwhelmingly supported the decision by the State to deny SCE's request for refund. Despite SCE's efforts to recast the evidence produced at trial in a way that supports its extraordinary refund request, it has again failed to make its case.

III. STATEMENT OF FACTS

The District Court made the following findings of fact:

1. The tangible personal property purchased by SCE was the coal slurry product.[3]
2. After processing and transportation by BMP, the sales transaction between Peabody and SCE took place in Nevada when title to the coal slurry passed to SCE upon delivery at Mohave.[4]
3. Risk of loss for the coal slurry and water passed from Peabody to SCE at the same time title was passed at the receiving facilities of the Mohave Generating Station in Nevada.[5]
4. There is no record that any coal mine in Nevada has been subject to the Net Proceeds of Minerals tax or that any coal miner or supplier has ever made a sale of coal in Nevada that was not subject to either sales or use tax.[6]
5. Peabody did not compete with any Nevada companies that mined coal in Nevada.[7]

[3] JA Vol. II, p. 259, Finding of Fact #7
[4] JA Vol. II, p. 260, Finding of Fact #12
[5] JA Vol. II, p. 260, Finding of Fact #13
[6] JA Vol. II, p. 261, Finding of Fact#16
[7] JA Vol. II, p. 261, Finding of Fact#17

6. Peabody did not compete with any oil, natural gas, or geothermal producers in Nevada.[8]
7. There is no evidence that any coal transaction in Nevada was exempt from sale or use tax pursuant to NRS 372.270.[9]
8. SCE did not pay any sales tax to the State of Arizona on its purchase of the coal slurry. Any tax was paid by Peabody to the State of Arizona.[10]
9. SCE has not been taxed differently than any other similarly situated taxpayer on the use of coal in the State of Nevada nor any other tax payer who has had a product delivered to Nevada for use in this State.[11]
10. SCE did not suffer any discrimination in fact in comparison to any other purchaser of coal in Nevada.[12]
11. SCE has not suffered any injury as a result of the exemption in NRS 372.270 that would entitle it to retroactive relief.[13]

The District Court's Findings of Fact were not clearly erroneous and were supported at trial by substantial evidence as follows:

From 1970 until 2001, SCE voluntarily remitted use tax to Defendant, Nevada Department of Taxation ("Department") on its consumption of coal at the Mohave Generating Station.[14] Beginning in April 2001, SCE filed claims with the Department seeking a refund of use taxes paid from March 1998 forward.[15]

The use tax was imposed pursuant to NRS 372.185. There is an exemption for sales and use tax in NRS 372.270 for proceeds of mines subject to taxes levied

[8] JA Vol. II, p. 261, Finding of Fact #18
[9] JA Vol. II, p. 261, Finding of Fact #19
[10] JA Vol. II, p. 262, Finding of Fact#27
[11] JA Vol. II, p. 262, Finding of Fact#30
[12] JA Vol. II, p. 262, Finding of Fact#31
[13] JA Vol. II, p. 262, Finding of Fact#32
[14] JA Vol. VI p. 1186, ll. 17-23.
[15] JA Vol. VI p. 1183, ll. 7-13.

pursuant to NRS Chapter 362. The coal at issue in this matter was mined in Arizona and consequently was not taxed pursuant to NRS Chapter 362.

SCE purchased the coal it used at the Mohave Generating Station from Peabody Western Coal Company ("Peabody").[16] Peabody had a requirements contract with SCE and sold all of the coal mined from the Black Mesa mine to SCE.[17] Peabody entered into an agreement with Black Mesa Pipeline ("BMP") to transport coal, slurry, and water 273 miles from the coal slurry preparation plant at the Black Mesa Mine in Arizona to the Mohave Generating Station in Nevada, via a coal slurry pipeline.[18] The sale of the coal, slurry, and water took place in Nevada.[19] The risk of loss followed the title upon delivery at Mohave.[20] If Peabody had a physical nexus in Nevada, Peabody would have been liable for collection of sales tax on the coal.[21] SCE's purchase of coal in Nevada was a garden-variety retail sale.

Water is scarce in the Western United States and there is an oft-quoted phrase that whiskey is for drinking and water is for fighting over.[22] The scarcity of

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[16] JA Vol. I p. 0216, ll. 5-6. Vol. II pp. 0367-0390 and Vol. III pp. 0391-0508.
[17] JA Vol. III pp. 0440-0442.
[18] JA Vol. III, pp. 0509-0524 and 0525-0614.
[19] JA Vol. VI p. 1187, l. 19 to p. 1188 and p. 1224 ll. 9-22; *see also* JA Vol. III p. 0401-0402.
[20] JA Vol. III p. 0401.
[21] JA Vol. VI p. 1188, l. 11 to p. 1189 and LA Vol. p. 1303, l. 12 to p. 1304, l. 13.
[22] Guy Rocha, *Myth #122 - What Mark Twain Didn't Say*, Nevada State Library and Archives, 2011.

water resources in this region is intimately connected to SCE's use of coal slurry at the Mohave Generating Station. It begins with an agreement between the Colorado River Commission and SCE wherein the provision of water from the Colorado River, used for cooling purposes at the Mohave Generating Station, is conditioned upon SCE's use of coal from the Black Mesa area located on Indian Reservation land in Arizona as its primary fuel source for Mohave.[23] Additional water from the Indian Reservation was used to transport the coal as slurry and this water was also reused at the Mohave Generating Station.[24] The quest for water continued until the Mohave Generating Station closed in 2005. The primary reason for the plant's closure involved costs associated with the installation of necessary pollution control devices.[25] But in order for the Mohave Generating Station to continue operating past 2005, a new source of water was needed for the coal slurry pipeline.[26] There also was uncertainty as to whether Colorado River water, needed for cooling, would be available after 2026.[27]

The coal slurry pipeline was the first of its kind when it was built.[28] Many engineering considerations came into play when initially designing the pipeline

[23] JA Vol. V pp. 1048 and 1067; *see also* JA Vol. VI p. 1210, ll. 5-24, p. 1214, ll. 9-24, p. 1216, l. 10 to p. 1218, l. 18, and p. 1222, l. 10 to p. 1224, l. 3.
[24] JA Vol. VI p. 1219, l. 11 to p. 1221, l. 20.
[25] JA Vol. VII p. 1335, l. 4 to p. 1336, l. 19; *see also* JA Vol. VI p. 1096.
[26] JA Vol. VI, pp. 1098-1102 and pp. 1158-1159.
[27] *Id.* at p. 1159; *see also* JA Vol. VI p. 1262, l. 12 to p. 1263, l. 2.
[28] JA Vol. VI, p. 1264, 11. 16-18.

and the coal slurry product to be used at Mohave, such as the hydraulic characteristics of the slurry, the particle size distribution of the coal in the water, viscosity, pipe diameter, and flow velocity or the speed at which the slurry moves through the pipeline.[29] Processing of the coal was necessary for both transportation and for its ultimate use as fuel at the Mohave Generating Station.[30]

The Black Mesa was a strip-mine operation.[31] From the strip mining operation, the coal was sized with a crusher to a 2"x0" size.[32] A number of stockpiles were created so that the coal could be blended for ash, BTU, or energy content and a number of other parameters.[33]

The coal was transferred via conveyor into raw coal bins at the coal slurry preparation plant.[34] It was crushed again to quarter inch size.[35] After that crushing process, water was introduced and the coal entered a piece of equipment called a rod mill where it was crushed even further into the size consistency necessary to transport it via the pipeline.[36] A majority of the coal was pulverized to 28x325

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[29] *Id.* at p. 1265, l. 12 to p. 1268, l. 24 and JA Vol. VI p. 1229, l. 16 to p. 1230, l. 3.
[30] JA Vol. VI p. 1278, ll. 1-16 and p. 1279, ll. 4-21. *see also* JA Vol. VI, p. 1191, l. 22 to p. 1192, l. 2.
[31] JA Vol. VI p. 1193, ll. 7-24.
[32] *Id.* at p. 1198, ll. 11-22 and p. 1226, l. 12 to p. 1227, l. 2.
[33] *Id.* at p. 1199, l. 16 to p. 1200, l. 6.
[34] *Id.* at p. 1200, ll. 17-21; *see also* JA Vol. III p. 531.
[35] JA Vol. VI p. 1200, l. 22 to p. 1201, l. 2.
[36] *Id.* at p. 1200, l. 22 to p. 1201, l. 10. *See also* JA Vol VI p. 1269, l. 17 to p. 1270, l. 7 and p. 1271, l. 24 to p. 1272, l. 10 and JA Vol. VII p. 1394, l. 9 to p. 1395, l. 4.

mesh size.[37] All of the processing and fine pulverization of the coal that occurred at the coal slurry prep plant are considered non-mining processes.[38]

The processing was not only to facilitate transportation of the coal as slurry, but also for its ultimate use as fuel at Mohave.[39] Mohave did not have the intermediate pulverization capability to take the 2"x0" coal from Peabody and crush it to the size specifications used for the slurry.[40] The process also removed impurities which improved the quality of the coal as fuel.[41]

The crushed coal was introduced to the pipeline in slurry form.[42] It took approximately three days for the coal to reach the Mohave Generating Station.[43] The coal slurry could not be used at a conventional power plant that accepted coal in dry form because it wouldn't have the equipment for handling coal slurry.[44] Mohave on the other hand, had no dry coal handling facilities; it was specifically

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[37] JA Vol. III p. 531.
[38] JA Vol. VII p. 1449, l. 12 to p. 1450 l. 14; p. 1454, l. 13 to p. 1471, l. 5; *see also* JA Vol VI pp. 1088-1089.
[39] JA Vol. VII, p. 1403, ll. 12-20.
[40] JA Vol. VII, p. 1403, l. 21 to p. 1404, l. 24; *see also* JA Vol. VI p. 1278, l. 1 to p. 1279, l., 21 and p. 1191, l. 22 to p. 1192, l. 2.
[41] JA Vol. VI, p. 1232, l. 22 to p. 1233, l. 17; *see also* JA Vol. VII, p. 1396, l. 18 to p. 1397, l. 11.
[42] JA Vol. VI, p. 1202, ll. 1-14.
[43] JA Vol. VI, p. 1202, ll. 15-20.
[44] JA Vol. VI, p. 1231, l. 18 to p. 1232, l. 21; *see also* , p. 1273, ll. 4-8 and p. 1274, ll. 1-22.

designed to accept coal in the form of slurry.[45] Even the coal stored in the Marcona ponds at Mohave had to be re-slurried before it could be burned as fuel.[46]

When it arrived at Mohave, it would either go to the burn tanks that contained agitators to keep the coal slurry in suspension or it went into storage for later use at the power plant.[47] The coal was pumped from the burn tanks through a loop, and the loop supplied 20 centrifuges per unit which separated the water from the coal.[48] The water that had been removed via the centrifuges was transferred to a clariflocculator which removed fine coal particles that were pumped back into the burner fronts and combusted in the furnace.[49] If the Mohave Generating Station could have used dry coal, it would not have needed such things as six million-gallon storage tanks with paddle agitators, Marcona ponds, centrifuges, or clariflocculators.[50]

The price SCE paid for the coal included the mine price and the transportation component.[51] The mine price was the price of the coal delivered to

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[45] JA Vol. VII, p. 1228, l. 22 to p. 1229, l. 9; *see also*, JA Vol. VI p.1277, l. 3 to p. 1278, l. 1.
[46] JA Vol. VII, p. 1400, ll. 4 – 21. *See also* 1401-1402 and JA Vol. VI, p. 1237, ll. 3-16.
[47] JA Vol. VI, p. 1202, l. 21 to p. 1203, l. 3.
[48] *Id.* at p. 1203, ll. 4-11.
[49] *Id.* at p. 1204, ll. 3-19.
[50] JA Vol. VI, p. 1236, l. 14 to p. 1238, l. 19; *see also* p.1274, l. 23 to p. 1275, l. 12.
[51] JA Vol. VI, p. 1208, ll. 9-22.

the coal slurry preparation plant at the Black Mesa Mine.[52] The initial mine price was set in the Coal Supply Agreement.[53] The initial price of the coal was subject to a series of adjustments such as for labor costs, benefits paid to the miners, administrative and general costs, inflation and deflation, changes in law that required an added cost to extract the coal, taxes for which Peabody was responsible, costs associated with Peabody's acquisition of major equipment, royalties paid to the Navajo Nation and the Hopi Tribe, and a BTU adjustment, all of which were calculated before the coal was delivered to the coal slurry preparation plant.[54]

The transportation charges added to the mine price included a demand charge and a commodity charge.[55] The demand charge was for maintaining the capacity to transport coal.[56] The commodity charge is based on the actual tons delivered.[57] Insurance and taxes were also added to the delivery charge.[58]

The use tax SCE paid to the State of Nevada was accounted for as a component of the fuel acquisition costs.[59] Fuel costs are accounted for as a pass-

[52] JA Vol. VI, p. 1225, ll. 1-7.
[53] JA Vol. VI, p. 1244, l. 18 to p. 1245, l. 10.
[54] *Id.* at p. 1245, l. 1 to p. 1251, l. 14.
[55] *Id.* at p. 1251, ll. 15-19.
[56] *Id.* at p. 1252, ll. -21.
[57] *Id.* at p. 1253, ll. 2-16.
[58] *Id.* at p. 1253, l. 17 to p. 1254, l. 3.
[59] JA Vol. VI, p. 1178, l. 21 to p. 1179, l. 8.

through, paid for in effect by the rate-payers.[60] SCE also reimbursed Peabody for various taxes that Peabody paid to the Indian Tribes, the State of Arizona, and the federal government. These taxes were also accounted for by SCE as a component of the price of coal.[61]

Crushing, fine pulverization, and removing impurities from the raw coal added to its value as fuel for Mohave. The initial mine price for the coal was set by contract at $3.796 per ton.[62] The total mine price of the coal delivered by Peabody to the coal slurry processing plant was approximately $20.68 per ton based on the April 2000 Peabody invoice.[63] Based on the same invoice, the final delivery price to Mohave after processing at the coal slurry processing plant and transportation to Mohave was $24.70 a ton.[64]

Nevada does not have any significant coal deposits.[65] Due to geologic conditions in the past three hundred million years, there is no coal found in sufficient quantity or quality to support the commercial production of electricity.[66] No coal was mined in Nevada during the time period relevant to this lawsuit.[67]

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[60] *Id.* at p. 1181, ll. 2-5.
[61] JA Vol. VI p. 1189, l. 22 to p. 1190, l. 24; *see also*, p. 1246, l. 17 to p. 1248, l. 10 and p. 1249, ll. 12-22.
[62] JA Vol. VI p. 1250 l. 22 to p. 1251, l. 10, and JA Vol. II p. 0360.
[63] JA Vol. II p. 0360.
[64] JA Vol. VI p. 1258, ll. 11-14 and JA Vol. II p. 0360.
[65] JA Vol. V p. 0969. *See also* JA Vol. VII p. 1405, ll. 6-9.
[66] JA Vol. VII p. 1406, l. 5 to p. 1408 l. 5.
[67] JA Vol. VII p. 1409, ll. 16-22.

Consequently, there is no coal that would have been exempt from sales or use tax by virtue of being taxed under NRS Chapter 362.[68] Since any coal used in Nevada would have been mined in another state, the coal would be subject to Nevada's sales or use tax.[69] Peabody and other out-of-state coal mining companies had a monopoly on coal markets in Nevada.[70]

Coal also does not compete with other Nevada minerals that could be used to generate electricity in a power plant.[71] During the years at issue, there simply was not enough oil or gas produced in Nevada to produce electricity in a commercial power plant.[72] Although geothermal fluids were used to produce electricity, geothermal is vertically integrated. The geothermal fluids or steam are not bought and sold the way coal is.[73] Even if there were such fuels available in Nevada, they would not compete with Peabody in supplying fuel to the Mohave Generating Station since SCE was contractually obligated to use coal from the Black Mesa Mine in Arizona.[74]

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[68] JA Vol. VI p. 1192, ll. 4-8.
[69] JA Vol. VI p. 1305, l. 6 to p. 1306, l. 10.
[70] JA Vol. VII p. 1426, l. 9 to p. 1427, l.10.
[71] JA Vol. VI p. 1294 ll. 6-13.
[72] JA Vol. V pp. 971-972; *see also* JA Vol. VII p. 1354, l. 17 to p. 1356, l. 9, p. 1367, ll. 9-13, p. 1370, l. 10 to p. 1371, l. 9.
[73] JA Vol. VII p. 1356 l. 10 to p. 1357, l. 13; p. 1359, ll. 7-11; and p. 1363, ll. 20-23. *See also* JA Vol. VI p. 1280, l. 10 to p. 1281, l. 7.
[74] JA Vol. V p. 1048 ¶ 14 and p. 1067-1068 ¶ 5; *see also* Vol. VI, p. 1210, ll. 5-24, p. 1214, l. 5 to p. 1216, l. 14, p. 1217 l. 20 to p. 1218 l. 7 and p. 1219, ll. 4-10.

SCE failed to identify a single transaction on coal in Nevada that was not subject to either sales or use tax. Apart from SCE's purchase of coal, the only other purchase of coal identified in the record was NV Energy's out-of-state purchase of coal. NV Energy also paid the Department use tax on its purchase of coal.[75] The Department treated SCE's in-state purchase of coal the same as it treated NV Energy's out-of-state purchase of coal.

SCE had access to the Department publication, the Net Proceeds of Minerals Bulletin, for the years 1998-2001. The Bulletins identify all of the mining companies that paid the Net Proceeds tax for those years.[76] SCE failed to identify a single taxpayer identified in the Net Proceeds of Minerals Bulletin that sold minerals at retail in Nevada that was exempt from sales or use tax pursuant to NRS 372.270. SCE failed to identify any transactions on oil, natural gas, or geothermal steam to a power plant in Nevada that was exempt from taxation pursuant to NRS 372.270.[77] With the possible exception of gold splatters, SCE failed to identify any sale of minerals at retail in Nevada that were exempt from sales tax pursuant to NRS 372.270.

[75] JA Vol. II pp. 0329-0343.
[76] JA Vol. IV pp. 0735-0824.
[77] JA Vol. VII p. 1417, l.8 to p. 1419 l. 24 and p. 1420, ll. 2-11; *see also* JA Vol. VI, p. 1294 ll. 6-13, JA Vol. V, pp. 0971-0972, JA Vol. VI p. 1354, l. 17 to p. 1356, l. 9, p. 1357, ll. 9-13, p. 1280, l. 10 to p. 1281, l. 7.

SCE introduced an Executive Director's Exemption and Refund Report dated February 1999 that was not provided to the Department during discovery.[78] SCE did not lay a foundation regarding how or why this report was prepared. The estimated amount listed in the report for NRS 372.270 is $217.7 million in exemptions from sales and use tax. As noted by Professor Swain, that amount is equal to multiplying the total estimated mineral values for all minerals produced in Nevada (which includes aggregates that are not subject to net proceeds of minerals tax) from the Division of Minerals Report from 1998 and multiplying it by the tax rate of 6.58%.[79] Such a calculation, of course, bears no relation to actual exempt retail sales of minerals in Nevada and SCE still failed to present documentary evidence of any specific exempt transaction on minerals, much less on coal.

During the period from March 1998 to December 2001, Mohave never had to reduce its output due to competitive pressure.[80] Mohave's fuel costs were always lower than the Market Clearing Price.[81] SCE had the documentation necessary to identify competitors to determine whether the competitors were relying on a fuel source that was exempt from taxation.[82] But SCE did not identify any such competitors. Mohave did not compete with Nevada geothermal plants or

[78] JA Vol. IV, p. 615-734.
[79] SA p. 1544-1547.
[80] JA Vol. VII, p. 1416, l. 12 to p. 1419, l. 1.
[81] JA Vol. VII p. 1416, ll. 2-11.
[82] JA Vol. VII, p. 1420, l. 12 to p. 1422, l. 4; p. 1424 ll. 3-18 and p. 1425, ll. 2-17; and p. 1429, ll. 2-9.

other qualifying facilities (QFs) under Public Utilities Commission Nevada (PUCN) contracts because those plants were paid administered prices insensitive to changes in market conditions.[83]

Because of regulatory action by the California Public Utilities Commission (CPUC) SCE recovered all of its investment costs in Mojave through 2005.[84] SCE's allowed profits for Edison International shareholders from Mohave were unaffected by the sales price of or the cost of fuel for energy produced by Mohave during the 1998 to 2000 period.[85] SCE's expert Dr. Jurewitz was not an expert in the dormant Commerce Clause and state taxation and could not cite any specific evidence to support the opinions in his expert report.[86] SCE did not suffer any economic harm as a result of the exemption in NRS 372.270. [87]

Lastly, SCE makes a creative argument that it is somehow entitled to a credit for a tax that Peabody paid to the State of Arizona for the privilege of doing business in Arizona. The charges at issue were simply a part of the price SCE agreed to pay for coal.[88]

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[83] SA p. 1489.
[84] SA p. 1488.
[85] *Id*.
[86] SA pp. 1531-1541, JA Vol. VII, pp. 1354-1374, SA pp. 1542-1543.
[87] JA Vol. VII p. 1428, l. 15 to 1429, l. 9, SA pp. 1485-1491.
[88] JA Vol. VI p. 1253 l. 11 to p. 1254 l. 3; *see also* JA Vol. III pp. 0409 to p. 0410.

IV. STANDARD OF REVIEW

This court reviews a district court's findings of fact for an abuse of discretion and will only reverse such conclusions if they are clearly erroneous or unsupported by substantial evidence. *NOLM, LLC v. County of Clark,* 120 Nev. 736, 739 (2004). In a bench trial, a determination based on substantial evidence will not be reversed based on conflicting evidence. *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1031 (1996). Substantial evidence is adequate to support the conclusion of a reasonable mind. *Radakar v. Scott,* 109 Nev. 653, 657 (1993). A district court's findings are not set aside unless they are clearly erroneous. *Id.*

V. ARGUMENT

A. As a Taxpayer that is Similarly Situated to NV Energy it Would Violate the Taxpayers Bill of Rights to Refund Use Tax on Coal Purchases to SCE After Denying a Refund to NV Energy.

Nevada's Taxpayer's Bill of Rights states that each taxpayer in the State has the right to be treated with "uniformity, consistency and common sense." NRS 360.291(1)(a). This Court recently faced a similar claim for refund of use tax paid on coal produced out-of-state. *Sierra Pacific v. State Department of Taxation*, ___ Nev. ___, 338 P.3d 1244 (2014). The Court specifically found that SCE and NV Energy paid the same tax pursuant to NRS 372.185 for coal produced out-of-state. *Id*. at ___, 1249.

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SCE and NV Energy were similarly situated taxpayers during the time period at issue because they are both power companies that operated power plants in Nevada that used coal as fuel. Both SCE and NV Energy were required to purchase coal mined out-of-state because there was no coal of the quality or quantity to satisfy their fuel needs. Both SCE and NV Energy voluntarily paid use tax to the State of Nevada on the coal consumed at their power plants. There are no significant facts that would justify treating the two taxpayers in a disparate manner.

There are two distinguishing facts between SCE's coal purchases and NV Energy's coal purchases that render it even clearer that SCE is not entitled to a refund. The first is that transfer of title and risk of lost for SCE's purchase of coal actually took place in Nevada, not out-of-state like the coal transactions in NV Energy. Because the transaction took place in Nevada there is no interstate commerce or dormant Commerce Clause issue at all for SCE. It only offers further proof that all transactions on coal in Nevada are subject to either a sales or use tax and that no transactions on coal in Nevada are exempt from taxation pursuant to NRS 372.270.

The second distinguishing factor is that SCE, unlike NV Energy, was purchasing a highly processed coal slurry product as opposed to raw coal. Just like gold may be subject to a net proceeds of mineral tax and then a sales tax when it is transformed into a ring and sold at retail, so too the coal slurry product even if

created from hypothetical Nevada coal would not be subject to the exemption in NRS 372.270 and would be fully taxable as tangible personal property.

Providing SCE a refund, having denied a refund to NV Energy, a similarly situated taxpayer, would violate the Taxpayer's Bill of Rights and would not be uniform or consistent and would fly in the face of common sense.

B. SCE is not Entitled to a Multi-Million Dollar Refund Based on NRS 372.185(2).

In its first claim for relief, SCE asserted that its use and consumption of coal is exempt from taxation pursuant to NRS 372.185(2). NRS 372.185 states:

> 1. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from any retailer on or after July 1, 1955, for storage, use or other consumption in this State at the rate of 2 percent of the sales price of the property.
> 2. The tax is imposed with respect to all property which was acquired out of state in a transaction that would have been a taxable sale if it had occurred within this State.

Based on the plain language of the statute, NRS 372.185(2) does not apply to SCE since the taxable sale on the coal slurry product purchased by SCE occurred in Nevada. There was no out-of-state transaction and the sale and use of the coal slurry product occurred within this State and was taxable. Since there is no coal mined in Nevada subject to taxation pursuant to NRS Chapter 362, there can be no sales of coal in Nevada exempt from taxation based on NRS 372.270.

SCE argues that this Court should not analyze the exemption in NRS 372.270 in isolation, but rather as a "scheme" based on its interplay with NRS 372.185(2). The actual facts in this case, however do not present any interplay between the statutes. There is a hypothetical, not actual, scenario whereby domestic coal, in competition with out-of-state coal, is not subject to sales or use tax. But without domestic coal, there is no interplay between NRS 372.270 and NRS 372.185 presented by the facts of this case, there is simply a constitutional garden-variety use tax on tangible personal property. There is no unconstitutional taxing scheme and no basis for a multi-million dollar refund.

C. SCE is not Entitled to a Multi-Million Dollar Refund Under the Dormant Commerce Clause.

In its Second Claim for Relief, SCE asserts that the application of Nevada's use tax to SCE's use and consumption of the coal slurry product it acquired from Peabody discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution. SCE argues this is so because the sales and use tax exemption in NRS 372.270 only applies to minerals extracted from mines in Nevada, therefore, Nevada taxes the sale of coal extracted from mines in Nevada more favorably than it does the use or consumption of coal extracted from out-of-state.[89]

[89] JA Vol. 1, p.112, ll. 9-12.

Notably, SCE's 2nd Amended Complaint raises discrimination pursuant to the dormant Commerce Clause, but never mentions several other theories of relief currently being floated by SCE including competing fuels (natural gas, geothermal, oil), the internal consistency test, the apportionment prong of the *Complete Auto*[90] test and illegal tariffs.

SCE has never been able to answer the question raised by its Second Claim for Relief and that is: what coal transaction was treated more favorably than SCE's transactions on coal purchased and consumed in Nevada? Because SCE cannot identify any transaction on coal that was treated more favorably, they fail to prove that they suffered an injury that gives them standing to bring suit pursuant to the dormant Commerce Clause or that entitles them to a remedy. After alleging discrimination based on more favorable treatment for Nevada coal producers, SCE turns around and says it is not required to prove that an in-state business was benefitted in order to be entitled to a multi-million dollar refund based on discrimination.

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[90] In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court set out a test to determine whether the state tax provision violates the Commerce Clause. A state tax provision will survive a Commerce Clause challenge "so long as the tax (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State." *Quill v. N. Dakota*, 504 U.S. 298, 311 (1992) (citing *Complete Auto Transit, Inc. v. Brady at 279*).

1. SCE Does not Have Standing to Bring a Claim for Violation of the Dormant Commerce Clause.

The doctrine of standing derives from Article III of the United States Constitution which confines federal courts to adjudicating actual cases and controversies. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); and, *Allen v. Wright*, 468 U.S. 737, 750 (1984). In addition to the Constitutional requirements, the standing doctrine includes prudential or judicially created limits on the exercise of jurisdiction such as the prohibition on a litigant raising another person's legal rights, the rule barring adjudication of generalized grievances, and the requirement that plaintiff's complaint fall[s] within the zone of interests to be protected by the statute or constitutional guarantee in question. *Valley Forge*, 454 U.S at 474-75; *Allen*, 468 U.S. at 751.

While noting that state courts are not bound by federal standing principles that derive from Article III of the Constitution, the Nevada Supreme Court adopted the prudential requirement that to establish standing, "a party must show a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." *Heller v. Legislature of the State of Nevada*, 120 Nev. 456, 461 (2004).

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a. SCE's Purchase in Nevada of a Coal Slurry Product Does not Fall Within the Zone of Interests Protected by the Dormant Commerce Clause.

The Zone of Interest test is applicable to claims, such as this one, alleging a violation of the dormant Commerce Clause. *Individuals for Responsible Government, Inc. v. Washoe County,* 110 F.3d 699, 703 (9th Cir. 1997); *see also City of L.A. v. County of Kern,* 581 F.3d 841, 846-47 (9th Cir. 2009). To ascertain whether a plaintiff has standing to raise a Commerce Clause challenge, the Court must determine whether the plaintiff's interests bear more than a marginal relationship to the purposes underlying the Commerce Clause. *Individuals for Responsible Government,* 110 F.3d at 703; *City of L.A.,* 581 F.3d at 847.

SCE has failed to establish that its purchase in Nevada of a coal slurry product and payment of use tax on the transaction falls within the protections of the dormant Commerce Clause. There is no basis for treating the use tax paid by SCE for the consumption in Nevada of a coal slurry product manufactured in Arizona any different than a sales or use tax paid on a motor vehicle manufactured in Michigan, where title is transferred to a consumer in Nevada. Both are taxable by Nevada, regardless of what occurred with the product prior to the transfer of title in Nevada. Further, as noted above, SCE's purchase of a highly processed coal slurry product would be taxable even if manufactured using hypothetical coal mined in Nevada.

b. Even as a Customer of Peabody, SCE has no Standing.

In *General Motors*, the United States Supreme Court was asked to determine whether GM had standing to raise a claim on behalf of out-of-state vendors of natural gas, even though GM was not a member of that class. *Gen. Motors Corp. v. Tracy*, 519 U.S. at 286. The Court discussed the *Bacchus* case that dealt with Hawaii's tax scheme that exempted certain alcohols produced in-state from liquor taxes. *Id*. at 287. In the *Bacchus* case, the Court found that wholesalers, although not among the class of out-of-state producers, suffered economic injury both because they were directly liable for the tax and because the tax raised the price of their imported goods relative to the exempted in-state beverages. *Id*. (citing *Bacchus Imports, LTD v. Dias*, 468 U.S. 263, 267 (1984)).

Based on its reasoning in *Bacchus*, the Court concluded that:

> . . . [a] cognizable injury from unconstitutional discrimination does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured, as in this case where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers. Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III.

Id. at 286 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). Even though the Court found that GM had standing, ultimately they decided there

was no violation of the dormant Commerce Clause and that GM was not entitled to relief. *Id*. at 312.

The facts of this case, however, are distinguishable from *Bacchus* and *General Motors* in that the out-of-state entity allegedly discriminated against, Peabody, had literally no competitors in Nevada. As established at trial, Peabody had a requirements contract with SCE and had no competitors for providing the primary fuel to Mohave. Further, unlike in *Bacchus* and *General Motors* where there was at least evidence of in-state producers of alcohol and natural gas receiving beneficial tax treatment, there are no such in-state coal producers in Nevada. As the United States Supreme Court noted in *General Motors*: "…in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *Id.* at 300. Thus, Peabody also lacks standing and therefore SCE cannot establish standing by stepping into the place of Peabody.

2. Contrary to SCE's Arguments, in Order to be Entitled to a Refund for a Violation of the Dormant Commerce Clause a Taxpayer Must Prove Actual Injury.

As noted by this Court in the *Sierra Pacific* case, "a refund is generally not merited when there has been no actual injury." *Sierra Pacific,* 338 P.3d at 1249

(citing *McKesson Corp. v. Florida*, 496 U.S. 18, 31 (1990). A taxpayer claiming a refund has the burden of showing an "injurious discrimination against them," and that "whatever distinction there existed in form, there was any substantial discrimination in fact." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481-82 (1932). The United States Supreme Court wrote in the *Associated Industries* case:

> … [W]e have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands. On the contrary, we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in 'effect' … and we have emphasized that 'equality for the purposes of . . . commerce is measured in dollars and cents, not legal abstractions.'

Associated Industries v. Lohman, 511 U.S. 641, 654 (1994) (quoting *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 70 (1963)), (internal citation omitted). Finally, the Hellerstein treatise states, in its introduction to the dormant Commerce Clause, "In the Court's view, its contemporary Commerce Clause state tax jurisprudence is grounded in 'economic realities', wedded to 'pragmatism', disdainful of 'formalism' and contemptuous of 'magic words and labels.'" Hellerstein, State Taxation, ¶ 412[1] (3d ed. 2013). SCE's entire dormant Commerce Clause argument is made up of legal abstractions, formalism, and magic words.

All of the cases cited by SCE for the proposition that there is no need to prove harm or identify competitors in order to challenge a facially discriminatory tax statute are cases where the remedy sought is declaratory or injunctive relief or

the statute at issue imposes a tax. None of the cases stand for the proposition that there is no requirement to prove harm or actual discrimination in order to be entitled to a multi-million dollar refund. *See Armco v. Hardesty*, 467 U.S. 638 (1984) (striking wholesale gross receipts tax); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (out-of-state ethanol producer sought to enjoin implementation of Ohio statute providing tax credit for ethanol producers); and, *Healy v. Beer Institute*, 491 U.S. 324 (1989) (taxpayer seeks declaratory and injunctive relief based on facially discriminatory beer-price-affirmation statute).

The facts in this case are distinguishable from the facts in the *Vulcan Lands* cases frequently cited by SCE. *Vulcan Lands v. Surtees*, 6 So.3d 1148 (Ala. App. 2007); *Ex parte Surtees*, 6 So.3d 1157 (Ala. 2008). In the case of V*ulcan Lands*, the United States Supreme Court in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), had already made a determination that the franchise tax assessed against all foreign corporations was discriminatory. As Vulcan Lands was in the class of taxpayers injured by the assessment of the franchise tax, the issue was the amount of damages. The Alabama Department of Revenue denied a refund because Vulcan Lands had not identified a domestic corporation that mirrored Vulcan Lands. The Alabama Supreme Court held Vulcan Land was not required to identify a "mirror image" domestic taxpayer. *Ex parte Surtees*, 6 So.3d at 1163. The Court held that the Department of Revenue must refund to Vulcan

the difference between the franchise tax a foreign corporation paid as compared to a favored domestic corporation. *Id.*

The use tax paid by SCE is not a tax that discriminates against a class of taxpayers. By virtue of the *South Central Bell Telephone* case, Vulcan Lands had already established that they had suffered harm and had identified taxpayers that benefitted as a result of the tax scheme. Here the State is not requiring SCE to identify a "mirror image" domestic taxpayer; the State is affirmatively stating that SCE has not suffered any discrimination based on the existence of the exemption in NRS 372.270.

SCE has never been able to find an evidentiary bridge over the gap between identifying the mere existence of a facially discriminatory exemption statute and proving how it was actually harmed in a way that entitles it to a multi-million dollar refund.

3. SCE was not Harmed by the Exemption in NRS 372.270 or by Paying the Constitutional Use Tax that was Actually Assessed.

This Court in *Sierra Pacific* wrote that NV Energy:

> …failed to show that the tax, as actually assessed, discriminates against interstate commerce. Specifically, NV Energy did not pay any higher tax than did its competitors—all paid the same tax. No competitor gained a competitive advantage under the discriminatory tax scheme, nor did NV Energy suffer any actual disadvantage. And, although the exemption to the use tax violates the dormant Commerce Clause, the use tax itself is not unconstitutional.

Sierra Pacific v. State Department of Taxation at 1249.

The same analysis applies to SCE. In *Great American Airways v. Nevada State Tax Comm'n*., 101 Nev. 422, 705 P.2d 654 (1985), this Court specifically found that the imposition of use tax pursuant to NRS 372.185 does not violate the dormant Commerce Clause since the tax, "treats intrastate and interstate businesses equally making no distinction between them." *Id* at 428, 658. (quoting *Chicago Bridge & Iron v. State Dept. of Rev.*, 98 Wash.2d 814, 659 P.2d 463, 472 (1983)). The Court recognized that the function of the use tax is to act as a complimentary tax to the sales tax and is a constitutional means to prevent a taxpayer from evading state sales tax. *Id*. The use tax collected by the Department on the coal slurry product purchased by SCE was not illegally collected or computed and it was not beyond the taxing power of the State.

SCE's expert, Dr. Jurewitz, gave testimony regarding economic harm that was entirely predicated on the theory that SCE paid an illegal tax.[91] The Department's expert witness, Dr. McCann, responded in detail in his report why SCE did not suffer any harm as a result of the exemption in NRS 372.270 or its payment of a constitutional use tax.[92] Dr. McCann also provided a road map demonstrating how SCE could have proven it was at a competitive disadvantage and suffered injury in comparison to other generators of energy if that were the case.

[91] JA Vol. VII, p. 1328, ll. 9-12.
[92] SA pp. 1485-1491.

As noted in the Statement of Facts, the district court made a factual finding that SCE did not suffer any injury as a result of the exemption in NRS 372.270 that would entitle it to retroactive relief. Even though there was conflicting evidence provided by the experts in this case, the district courts finding is not clearly erroneous and is supported by substantial evidence in the record and should be upheld by this Court.

4. The Discrimination Prong of the Complete Auto Test Requires Identification of Market Competitors that Benefitted From the Exemption in NRS 372.270 to Prove Discrimination.

SCE's claim that it does not have to identify a favored competitor is a misstatement of Commerce Clause jurisprudence. The United States Supreme Court has identified the fundamental objective of the dormant Commerce Clause as "preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). The Court wrote:

> Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.

Id. at 300.

a. The Market in this Case is the Coal Market not the Power or Fuel Market.

In Footnote 7 in the *Sierra Pacific* decision, this Court wrote:

> For a dormant Commerce Clause violation to exist, the claimed discrimination must create a competitive advantage between the 'substantial similar entities."…**However, competitive markets are generally narrowly drawn.**

Sierra Pacific, --- Nev. ---, n.7, 338 P.3d at 1249, n.7 (citations omitted) (emphasis added).

The notion of favored and disfavored market competitors is central to dormant Commerce Clause jurisprudence. *See, e.g., State of Alaska v. Arctic Maid,* 366 U.S. 199, 204 (1961) ("When we look at the tax laid on local canners and those laid on 'freezer ships,' there is no discrimination in favor of the former and against the latter."); *Halliburton Oil Well Cementing Co. v. Reilly,* 373 U.S. 64, 73-74 (1963) ("The effect of the tax is to favor local users who wish to dispose of equipment over out-of-state users similarly situated."); *Bacchus Imports v. Dias*, 468 U.S. 263, 273 (1984) ("Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other . . ."). In *Bacchus,* the Court also recognized that the market competitors can not only be taxpayers, but also goods. *Id*. at 268-269.

General Motors is factually similar to the current case in that it involved the fuel (natural gas) purchased by General Motors from out-of-state and how it was taxed compared to regulated natural gas produced within the state. The relevant market in that case was the natural gas market, not the motor vehicle market that

General Motor participates in. In fact the United States Supreme Court further narrowed the definition of the market to distinguish between regulated natural gas and un-regulated natural gas and determined the products served different markets and so there was no dormant Commerce Clause violation in that case. *Id.* at 301-03.

The market in this case is the coal market. As noted above, SCE's Second Claim for Relief alleged that Nevada favored coal extracted in Nevada. Because SCE now knows it cannot prevail in any argument that involves the coal market, it tries to say it is about the Western Grid power market, or the "fuel market", including geothermal, natural gas and oil.[93] In fact, SCE is not really clear what market is at issue in this case. SCE does not even try to explain, in dormant Commerce Clause terms, how its alleged disadvantages competing in the Western Grid have any relevance at all.

This case is about goods, specifically coal. SCE alleged the Department is discriminating against coal mined outside of Nevada as compared to coal mined in Nevada.[94] Thus, in order to prove a violation of the Commerce Clause, SCE must

[93] Even if you accept that the market is the power market or the "fuels market" SCE still failed to prove it suffered any actual injury as a result of the exemption in NRS 372.270.

[94] The Department still maintains that SCE purchased a coal slurry product, not raw coal. For the purpose of the market competitor argument, however, we identify the goods in this case as coal.

show that coal mined in Nevada was sold at retail and was not subject to sales or use tax because of the exemption in NRS 372.270; and that it cannot do.

5. SCE did not Allege and Cannot Prove that the Use Tax it Actually Paid Violated the Internal Consistency Test or was an Illegal Tariff.

SCE now alleges this case is also about the apportionment prong of the *Complete Auto* test, even though the Second Amended Complaint only alleged discrimination.[95] Further the Second Amended Complaint made no mention of an illegal tariff. As noted above, the Nevada Supreme Court applied the *Complete Auto* test specifically to the use tax imposed by NRS 372.185 and found that Nevada's use tax is properly apportioned, does not discriminate, and is fairly related to services provided by the State. *Great American Airways v. Nevada State Tax Commission*, 101 Nev. 422 (1985).

Ironically, SCE's expert witness, Professor Richard Pomp, wrote an article that it cites in its Opening Brief that explained in detail why the internal consistency test does not apply to a garden-variety sales tax. The same analysis applies to the use tax paid by SCE on these transactions that took place in Nevada. In the article, Professor Pomp writes:

> …from a practical standpoint, Oklahoma's levy closely resembled the 'garden-variety sales tax' on tangible personal property that the Court had 'perennially sustained, ***even though levied on goods that have traveled in interstate commerce to the point of sale***

[95] JA Vol. 1, p.112, ll. 9-12, Appellant's Opening Brief, p. 12, l. 14.

> ***or that will move across state lines thereafter.' Just as a state may impose a tax on the local sale of goods measured by their full sales price even though the price reflects value added outside the state***, so it might seem that a state may impose a tax on the local sale of services measured by their full sales price even though the price reflects value added outside the state.

Hellerstein, McIntyre, Pomp, *Commerce Clause Restraints on State Taxation after Jefferson Lines*. 51 Tax Law Review 47, 54 (Fall, 1995) (emphasis added).

The article, quoting the *Jefferson Lines* case, explains that there can be no internal or external inconsistency with a tax on a sales transaction because the "very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place, insulated the buyer from any threat of further taxation of the transaction." *Id.* at p. 58. The use tax was paid by SCE on the price of the coal slurry product in Nevada at the point where transfer of title and risk of loss took place. There simply is no internal consistency issue, and no violation of the apportionment prong of the *Complete Auto* test.

For argument's sake, even if the use tax paid by SCE in combination with the exemption in NRS 372.270 somehow fails the internal consistency test, SCE still has not provided any evidence it has been injured and it still does not have standing to bring suit pursuant to the dormant Commerce Clause. The Alaska Supreme Court in the *Tesoro* case concluded:

> [b]ecause Tesoro has not demonstrated it has suffered any harm as a result of the alleged internal inconsistency, it has failed to establish its standing in this case. We do not see why a taxpayer should be

> excused from application of a tax scheme whose alleged internal inconsistency results in no-less-favorable tax treatment than would have resulted from a consistent scheme.

Tesoro Corporation v. State of Alaska, Department of Revenue, 312 P.3d 830, 846 (2013) (cert. denied). Again, SCE has failed to show that "whatever distinction there existed in form, there was substantial discrimination in fact." *Gregg Dyeing*, 286 U.S. at 481-482.

Similarly, the illegal tariff argument was not raised in a timely fashion and does not apply to Nevada's sales and use tax. There is nothing to suggest that Nevada is assessing use tax in order to protect a Nevada coal market. When a tax is meant to protect or promote a local product, the local market is apparent.

An example is the dairy market in *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994). The concern in *West Lynn Creamery* was that a Massachusetts milk pricing order had the effect of saving the distressed Massachusetts' dairy industry and burdening out-of-state dairy producers. The United States Supreme Court likened it to a protective tariff or customs duty which "taxes goods imported from other States, but does not tax similar products produced in State." *Id*. at 193. The Court concludes that a tariff "violates the principle of unitary national market by handicapping out-of-state competitors, thus artificially encouraging in-state production even when the same goods could be produced at lower cost in other States." *Id*.

Mining, unlike other industries, can only happen where the minerals are located. Mining operations cannot be relocated from one state to another based on a state's favorable tax treatment. Nevada's use tax is not an illegal tariff on specific out-of-state goods competing with products produced in Nevada, especially as applied to the coal slurry product purchased by SCE.

6. This Court Should Reject SCE's Invitation to Reconsider its Interpretation of the McKesson Case.

SCE embraces the part of *McKesson* that requires meaningful backward looking relief, while at the same time disavowing the part of *McKesson* which provides that in cases alleging discrimination the State is only required to ensure, based on the taxes actually imposed during the period at issue, there was equal treatment between a taxpayer and its competitors. SCE cannot have it both ways. The case before this Court is an allegation of discrimination and a request for backward looking relief. *McKesson* is the United States Supreme Court case dealing with this exact issue and *McKesson*, all of *McKesson*, is the key to understanding why SCE is not entitled to any relief.

McKesson distinguishes between two types of tax situations where a clear and certain remedy is required. The first situation is taxes that were beyond the power of a State to impose and the second is "a tax that was unlawful because it was *discriminatory*, though otherwise within the State's power to impose." *McKesson*

Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 34 (1990) (emphasis in original).

Since the use tax is within the taxing power of the State, SCE is only entitled to a multi-million dollar refund if it can show, in the actual administration of the exemption in NRS 372.270 during the time period at issue, that the Department gave an unfair advantage to a market competitor in the coal market that resulted in an economic injury to SCE.

SCE says there has to be a remedy, if a statute is facially discriminatory in violation of the dormant Commerce Clause. And there is a remedy, which is to strike the statute as per se invalid. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore*., 511 U.S. 93, 99 (1994). It does not matter that this is not the remedy that SCE desires. SCE has simply not proven the facts necessary to demonstrate it is entitled to a refund.

D. SCE is not Entitled to a Credit for Taxes Peabody Paid to the State of Arizona in Connection with Peabody's Coal Mining Activities in Arizona.

Lastly, SCE claims that it is somehow entitled to a credit for a tax that Peabody, not SCE, paid to the State of Arizona for the privilege of doing business in Arizona. This argument is not supported by the record in this case. The District Court's Order contained the following relevant findings of fact:

> The price SCE paid Peabody for the coal slurry is set forth in the Amended Mohave Project Coal Supply Agreement, Sec. 6. The price for the coal slurry is paid for the coal delivered to the Mohave Project

> and is based on the mine price, the price for transportation, and all sale, use, production and severance taxes paid by the seller, mainly Peabody. Thus, Peabody is the entity that paid all taxes, not SCE. . . . Peabody retained title to the coal when it was transferred to BMP for processing and transportation. After processing and transportation by BMP, the sales transaction between Peabody and SCE took place in Nevada when title to the coal slurry passed to SCE upon delivery at Mohave.[96]

"A district court's factual determinations will not be set aside unless they are clearly erroneous and not supported by substantial evidence." *Dewey v. Redevelopment Agency of City of Reno,* 119 Nev. 87, 93, 64 P3d 1070, 1075 (2003). SCE concedes that "the facts concerning this claim are not in dispute."[97] But in making its argument SCE attempts to obscure these facts like coal smoke from the Mohave Plant obscured the view of the Grand Canyon.

In its Trial Statement SCE admitted that it agreed to reimburse Peabody for various taxes Peabody paid as part of the price SCE agreed to pay for the coal.[98] This fact is confirmed by the contracts between SCE and Peabody.[99] The contracts between SCE and Peabody also plainly state that delivery of the coal, slurry and water, risk of loss and transfer of title all take place at the Mohave Generating Station, which is in Nevada.[100] Because delivery, transfer of title and risk of loss

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[96] JA Vol. II p. 0300 ll. 12-24.
[97] Appellant's Opening Brief, p. 24, l. 10.
[98] JA Vol. I p. 0217, ll. 8-9.
[99] JA Vol. II p. 0376 and JA Vol. III pp. 0409 to p. 0410; *see also* JA Vol. VI p. 1253 l. 11 to p. 1254 l. 3.
[100] JA Vol. III p. 0401 and JA Vol. II, p. 0372.

all took place in Nevada, the sale clearly took place in Nevada and any argument to the contrary is more smoke and mirrors.

Peabody included the Arizona Transaction Privilege Tax ("TPT") as part of the sales price of the coal slurry product. SCE paid use tax to the State of Nevada on the entire sales price. Based on these facts the District Court correctly reasoned that the State of Nevada was entitled to collect use tax measured by the entire price of the coal slurry.[101] There is nothing particularly unusual about a transaction such as this in which a tax paid by the seller is included in the measure of the sales price paid by the consumer.[102] For this reason alone SCE is not entitled to a credit on the use tax it paid to the State of Nevada for a tax Peabody paid to the State of Arizona.

However, the District Court further found that:

> [E]ven assuming that SCE was entitled to a credit for sales tax Peabody paid, this credit does not apply to the Arizona Transaction Privilege Tax because in this context it is not a sales tax, it is levied on a seller's, Peabody's, gross receipts rather than each individual sale and is for the privilege of doing business in the State of Arizona. *Arizona Dep't. of Revenue v. Robinson's Hardware,* 721 P.2d 137, 141 (Ariz. Ct. App. 1986).[103]

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[101] JA Vol. II p. 0309.

[102] Hellerstein, State Taxation, ¶ 17.08 (3d ed. 2013) discussing *Gurly v. Rhoden,* 421 U.S. 200 (1975); *In re Tax Appeal of Atchison Cablevision LP,* 936 P.2d 721 (1997); and *GTE Southwest v. Tax. & Rev. Dep't,* 830 P.2d 162 (N.M. Ct. App. 1992), cert denied, 830 P2d 157 (1992).

[103] JA Vol. II p. 0309, ll. 14-19.

In the *Robinson's Hardware* case the Arizona Court of Appeals considered whether the Arizona TPT could be applied to goods that an Arizona company sold to a consumer in Mexico. The Court found imposition of the tax did not violate the Import-Export Clause, "for the simple reason that Arizona's transaction privilege tax is not a direct tax upon the goods appellant sells. Rather, it is a tax directly and specifically on appellant for the privilege of conducting business within the State of Arizona." *Robinson's Hardware,* 721 P.2d at 141.

Similarly, in *City of Phoenix v. West Publishing Co.*, 712 P.2d 944, 946-47 (Ariz. Ct. App. 1986) the Court of Appeals of Arizona explained the distinction between privilege and sales tax stating:

> the tax assessed by the City is a business privilege tax which is an exaction for the privilege of doing business within the City limits. This is to be distinguished from a sales tax, which is generally added to the selling price and is borne by the consumer, with the vendor being made an agent of the taxing authority for purposes of collection.

Here Peabody was not collecting the tax from SCE as an agent of the State of Arizona. Rather Peabody paid a severance tax to the State of Arizona in connection with its coal mining activities in Arizona. SCE agreed to reimburse Peabody as part of the price SCE paid Peabody for the coal slurry product.

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SCE claims, "[E]ven the website for the Arizona Department of Revenue acknowledges that the TPT is 'commonly referred to as a sales tax.'"[104] SCE then must concede that the website goes on to state, "however, the tax is on the privilege of doing business in Arizona and is not a true sales tax. Although the transaction privilege tax is usually passed on to the consumer it is actually a tax on the vendor."[105] Here the tax was on Peabody, the vendor, not SCE the consumer.

The Arizona Department of Revenue website goes on to explain that the Arizona Transaction Privilege tax is imposed on those engaged in certain business activities in that state. The "[T]ypes of business activities subject to the transaction privilege tax include . . . severance (mining, timbering)."[106] A severance tax is a tax on intrastate activity. *See e.g. Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 612-629 (1981). Thus the TPT applies to Peabody's mining activities within the State of Arizona. SCE paid use tax to the State of Nevada on its purchase and use of the coal slurry product in this State. These are separate and distinct transactions.

There is no violation of the Commerce Clause because the transaction in which the sale of the coal occurred was not taxed more than once. In the *Jefferson*

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[104] Appellant's Opening Brief p. 29, ll, citing to https://www.azdor.gov/business/transactionprivilegetax.aspx.
[105] https://www.azdor.gov/business/transactionprivilegetax.aspx (last visited September 11, 2015).
[106] *Id.*

Lines case the Supreme Court considered whether Oklahoma could charge sales tax on the full price of a ticket for bus travel from Oklahoma to another state. In its analysis the Court compared the sale of bus services to the sale of goods and found no violation of the Commerce Clause since the tax falls on the buyer of the bus service, "who is no more subject to double taxation than the buyer of goods would be." *Oklahoma Tax Commission v. Jefferson Lines, Inc.* 514 U.S. 175, 190 (1995) (holding superseded by 49 U.S.C. § 14505). The Court explained that the Commerce Clause does not forbid the assessment of a succession of taxes by different states as an object flows along in the stream of commerce and used the specific example of tangible goods such as coal subject to a severance tax in one state and a sales tax in another. *Id.* at 187-188. The Court explained:

> If, for example, in the face of Oklahoma's sales tax, Texas were to levy a sustainable, apportioned gross receipts tax on the Texas portion of travel from Oklahoma City to Dallas, interstate travel would not be exposed to multiple taxation in any sense different from coal for which the producer may be taxed first at point of severance by Montana and the customer may later be taxed upon its purchase in New York. The multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the accidental incident of interstate commerce being subject to two different taxing jurisdictions.

Id. at 192 (citations omitted).

Similarly in this case there is no violation of the Commerce Clause because Peabody paid a severance tax to the State of Arizona in connection with its mining

operations in that State, while SCE paid use tax to the State of Nevada in connection with the sale and use of the coal which occurred in this State. Accordingly, the District Court's decision denying SCE's request for a credit on the Arizona TPT paid by Peabody must be upheld.

VI. CONCLUSION

In light of the foregoing, the State of Nevada Department of Taxation respectfully requests that this Court enter its Order affirming the District Court.

Respectfully submitted this 14th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 font in the Times New Roman style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), and is proportionally spaced, has a typeface of 14 points or more and contains 11,332 words.

Finally, I hereby certify that I have read this *Answering Brief*, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of October, 2015.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on October 14, 2015, I electronically filed the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Supreme Court of Nevada (Court of Appeals of the State of Nevada) by using the appellate CM/ECF system.

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